

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 4388 OF 2007

IN

SUIT NO. 3171 OF 2007

VFS Global Services Private Limited. ... Plaintiff.

V/s.

Mr. Suprit Roy. ... Defendant.

.....

Mr. C.U. Singh, Senior Counsel with Mr. Ashish Kamath i/b. M/s. V. Deshpande & Co. for the Plaintiff.

Mr. Sandeep Parikh with Mr. H.N. Jain i/b. Gordhandas & Fozdar for the Defendant.

.....

CORAM : DR. D.Y. CHANDRACHUD, J.

10TH DECEMBER 2007.

ORAL JUDGMENT :-

. The Notice of Motion has been taken out by the Plaintiff in the present case for enforcing a negative covenant contained in a

contract of employment. The Defendant was employed by the Plaintiff on 12th July 1999 in the grade of Senior General Manager. On 2nd July 2001, he was transferred to the Visa Facilitation Services (VFS) Division and designated as General Manager. The terms and conditions of employment as originally envisaged continued to remain the same save and except as modified. Under the original contract of employment, the services of the Defendant could be brought to an end by either side with one month's notice or salary in lieu thereof. On 11th July 2003, additional terms and conditions were imposed by the employer. Among them was a condition that the Defendant shall not participate with any other company carrying on similar business and shall not commence similar business during the period of employment or for a period of two years thereafter.

2. A Memorandum of Understanding was thereafter entered into between the parties on 10th December 2003. Clauses 3 and 4 of the agreement provided for a covenant on confidentiality to the following effect :-

“ The Employee shall undertake that he will not make use

of disseminate or in any way disclose any confidential information of the company whether during the period of employment or after, to any person, firm or business except to the extent of necessary negotiation, discussion and consultation with personnel or authorized representatives of the Company and for any purpose that the Company may hereinafter authorize in writing.

The Employee shall treat all confidential information of the company with the same degree and care as it accords to its own confidential information and also represent that he will exercise reasonable care to protect the confidential information provided by the company.”

Under clause 6 it was provided that in the event that the Defendant left service or was terminated from service, he shall not enter into service with any other employer who has a conflict of interest with the business of the Plaintiff for a period of one year without the permission of the Management. On 26th July 2006 the Plaintiff, upon

a review of the conditions governing employment introduced a condition styled as a Garden Leave Clause to the following effect :-

“ The Company reserves the right to require you to remain away from work/employment for a period of 3 (three) months after termination or resignation of your services with the company. You shall agree to comply with all conditions that may be laid down by the Company at the time of such resignation or termination. The Garden Leave period shall commence after you have served the notice period and have ceased to be on the rolls on the Company.

You shall be bound and undertake that you will not directly or indirectly, whether through partnership or as a shareholder, joint venture partner, collaborator, employee, consultant or agent or in any other manner whatsoever, whether for profit or otherwise carry on any business, which competes directly or indirectly with the whole or any part of the business of visa processing services or having/conducting

business similar to the business conducted by the company for a period of 3(three) months after serving the notice period and ceasing to be an employee of the Company.

You shall also be bound to comply with the conditions of Non Compete and Non Solicitation as set out in the terms and conditions. The Company shall pay you compensation which shall be equal to 3 (three) month's remuneration last drawn by you at the time of your termination or resignation. Please note that the company shall apply this clause at its sole discretion and you shall not claim it as a right."

3. On 8th October 2007, the Defendant tendered his resignation from service and stated that while under the letter of appointment he was required to give a notice of 30 days, the activities with which he was currently involved with the Plaintiff would be completed, so as to enable him to depart by the last week of November.

4. The suit has been instituted on 31st October 2007 seeking damages in the amount of Rs.5 crores and for enforcing the negative covenant contained in the contract of employment. In prayer (a) of the Motion for interim relief, the Plaintiff has sought enforcement of the Garden Leave Clause with a view to prevent the Defendant from joining any other Company or Organization in the “Visa processing business” or travel related services or conducting business similar to that of the company contrary to the accepted terms of contract for a period of three months from the resignation. Prayer clause (b) of the Notice of Motion is for an injunction against from the disclosure of confidential information. Prayer clause (c) is for an injunction against the Defendant soliciting customers or employees. On the request of the learned Counsel and with their consent, this Motion has been taken up for final hearing and disposal.

5. The principal issue which arises before the Court relates to the enforceability of the Garden Leave Clause. Now, a perusal of the clause as it stands would make it prima-facie evident that the clause is intended to operate after the cessation of employment of the Defendant either upon termination or resignation from service. In fact,

the Garden Leave period is to commence after the employee has “served the notice period and have ceased to be on the rolls of the Company”. Under the clause the employee is prohibited, from carrying on any business which competes directly or indirectly with the whole or any part of the Visa processing services or a business similar to the business of the employer for a period of three months after serving the notice period and ceasing to be an employee of the company.

6. The fact that the Garden Leave Clause operates after the employee has ceased to be in service is not disputed on behalf of the Plaintiff by the learned Counsel. The submission before the Court however is that a clause of this nature is valid and is enforceable. In order to support this submission, reliance has been placed on the circumstance that under the clause the employer has agreed to pay compensation equal to three months' remuneration last drawn by the employee at the time of termination or resignation. On the other hand, it has been submitted by Counsel appearing on behalf of the Defendant that such a clause which operates after the term of

employment has come to an end would be in restraint of trade and therefore invalid under Section 27 of the Contract Act. Reliance has been placed on the Judgments of the Supreme Court in Superintendence Company of India (P) Ltd.V/s. Krishan Murgai (AIR 1980 S.C. 1717), M/s. Gujarat Bottling Co. Ltd. V/s. Coca Cola Company (AIR 1995 S.C. 2372), and Percept D' ~~Mrk~~ (India) Pvt.Ltd. V/s. Zaheer Khan (AIR 2006 [S.C.3426](#)). The learned Counsel also adverted to the Judgment of the Division Bench of this Court in Zaheer Khan V/s. Percept D' ~~Mrk~~ (India) Pvt. Ltd.(AIR 2004 Bombay 362) and the Judgment of a learned Single Judge in Taprogge Gesellschaft MBH V/s. IAEC India Ltd. (AIR 1988 Bombay 157).

7. Section 27 of the Indian Contract Act, 1872 provides that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind is to that extent void. An exception is carved out in Section 27 by which a person who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within specified local limits so long as the buyer carries on a like business, provided that such limits appear

to the Court reasonably having regard to the nature of the business. The only exception which is provided to the doctrine that an agreement in restraint of the exercise of a lawful profession, trade or business is void is where the goodwill of a business is being sold.

8. Since the Judgment of the Supreme Court in Niranjan Shankar Golikari V/s. Century Spinning & Mfg. Co. Ltd. (1967) 2 SCR 378 (AIR 1967 SC 1098 para 15), a distinction has been drawn in Indian law between a restrictive condition in a contract of employment which is operative during the period of employment and one which is to operate after the termination of the employment. A restriction during the term of employment is regarded as valid and not in restraint of trade. A condition which operates after the term of employment ceases is in restraint of trade. This distinction was adverted into in the Judgment of Mr. Justice A.P. Sen in Superintendence Co. of India V/s. Krishan Murgai (AIR 1980 [S.C.1717](#)) Mr. Justice V.D. Tulzapurkar who delivered the Judgment for His Lordship and Mr. Justice N.L. Untwalia held that it was not necessary for the decision of the case to decide whether such a

negative covenant was in restraint of trade. Mr. Justice A.P. Sen held thus :-

“ There is nothing in the wording of Section 27 to suggest that the principle stated therein does not apply when the restraint is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the facts fall within the exception to the section.

A contract, which has for its object a restraint of trade is prima facie, void. Section 27 of the Contract Act is general in terms and unless a particular contract can be distinctly brought within Exception 1 there is no escape from the prohibition. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act and put upon them the meaning which they appear plainly to bear.”

9. In Gujarat Bottling Company Limited V/s. Coca Cola Company (AIR 1995 [S.C.2372](#)), the Supreme Court adverted to Section 42 of the Specific Relief Act, 1963, under which, it has been provided that notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an agreement to do a certain act, coupled with a negative agreement, expressed or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. The Supreme Court held that the Court is however, not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer (para 45 at page 2388). In Percept D'Mark (India) Pvt. Ltd. V/s. Zaheer Khan (AIR 2006 [S.C.3426](#)) the Supreme Court upheld the Judgment of a Division Bench of this Court which had taken the view that the right of first refusal conferred by an agreement for the promotion of the services of a sportsman operated beyond the term of the agreement and was therefore an unlawful restraint of trade. The Supreme Court held thus

:-

“On the pleadings contained in the Arbitration Petition, there can be no escape from the conclusion that what the appellant sought to enforce was a negative covenant which, according to the appellant, survived the expiry of the agreement. This, the High Court has rightly held is impermissible as such a clause which is sought to be enforced after the term of the contract is prima facie void under Section 27 of the Contract Act.”

The legal position was summarised as follows :-

“ The legal position with regard to post-contractual covenants or restrictions has been consistent, unchanging and completely settled in our country. The legal position clearly crystallised in our country is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable, unless it falls within express exception engrafted in Section 27.”

The judgment of the Supreme Court in Zaheer Khan arose out of a petition under Section 9 of the Arbitration and conciliation Act, 1996. Parties were therefore permitted to espouse their rights and contentions before the Arbitral Tribunal. The judgment of the Supreme Court follows a line of precedent of the Court. The same view, it may be noted has been taken in the judgment of a learned Single Judge of this Court in Taprogge Gesellschaft MBH V/s. IAEC India Ltd. (AIR 1988 Bombay 157).

10. In the present case, the Garden Leave Clause is intended to operate after the contract of employment stands terminated, either as a result of resignation or upon the employee ceasing to remain in service upon termination. The submission of Counsel appearing on behalf of the Plaintiff that the payment of three months compensation by the employer would amount to an extension of the contract is contrary to the plain terms of the clause. The clause defines the period of three months to commence after the employee has served the period of notice and upon his having ceased to be on the rolls of the Company. The measure of compensation is three months of last

drawn wages. The payment of this compensation however, does not renew the contract of employment which has come to an end. The Garden Leave Clause is therefore, prima facie in restraint of trade and is hit by Section 27 of the Contract Act. The effect of the clause is to prohibit the employee from taking up any employment during the period of three months on the cessation of the employment. As the Judgment of Mr. Justice A.P. Sen in Krishan Murgai's case (Supra) holds there is nothing in Section 27 to suggest that the principle in Section 27 will not apply when the restraint is for a limited period. As held by the Supreme Court in Gujarat Bottling Co. Ltd. (Supra) a negative covenant of this nature cannot be enforced if it would indirectly compel the employee either to remain idle or to serve the employer. Finally, as held by the Supreme Court in Zaheer Khan's case (Supra), neither the test of reasonableness nor the principle of the restraint being partial would be applicable unless it falls in the exception carved out in Section 27. The exception which relates to the sale of the goodwill of a business is not applicable.

Reliance has been placed on an order passed by a learned

Single Judge of this Court on 8th and 11th June 2007 in Suit (Lodging) No. 1605 of 2007. The learned Single Judge granted ad-interim relief based on the Garden Leave Clause pending the hearing and final disposal of a Notice of Motion. The facts on the basis of which the injunctive relief in that case was granted are referred to in paragraph 5 of the Judgment which reads thus :-

“ It cannot be disputed that the period till 30th June is a crucial period for tour and travel business. If the Defendant were to join some other competing organization, he would be able to divert the prospective and even regular client(s) of the plaintiff with whom negotiations were inconclusive. Indeed, all this is a matter of guess work. But to obviate any such loss being caused to the Plaintiff, the Plaintiff is entitled to invoke the restrictions provided by the garden leave clause for the specified period on payment. Thus understood, I find no substance in the objection taken on behalf of the Defendant for continuing the ad-interim relief which was granted on 6.6.2007, which was obviously ex-parte in nature, though the Defendant was represented by the Advocate on that date of hearing.”

The distinguishing features of that case relating to the period – namely the month of June which was crucial for travel business – are absent here. In any event, in the present case the Motion has now been taken up for final disposal by consent of Counsel and it has been held that a clause of the nature involved in the case is in restraint of trade and hit by Section 27 of the Contract Act.

11. Apart from the aforesaid reasons, there is an additional factor which must weigh against the grant of an injunction to enforce the negative covenant in this case. Even according to the Plaintiff, the negative covenant is to remain in operation during the Garden Leave Period, and in fact that was the submission of learned Counsel before the Court. In paragraph 40 of the affidavit in reply, the Defendant has stated that he was reliably informed that the Chief Executive Officer (CEO) and the Chief Operating Officer (COO) of the Plaintiff had requested U.K. Visas to write to CSC (the prospective employer of the Defendant) calling upon CSC not to employ the Defendant. This statement in paragraph 40 of the reply has not been

denied in paragraph 23 of the Rejoinder. It is a well settled principle of law that the grant of an interlocutory injunction is equitable in nature and that the conduct of the party seeking interlocutory relief should be fair and honest **(Gujarat Bottling Co.)** (Supra) para 50 at page 2389. In the present case, the conduct of the Plaintiff cannot be regarded as meeting that description. To obstruct an employee who has left service from obtaining gainful employment elsewhere is not fair or proper.

12. On behalf of the Plaintiff it has been urged that by his E-mails dated 31st October 2007 and 15th November 2007, the Defendant had accepted that he would be bound by the Garden Leave Clause and consequently, the Defendant cannot be heard to assert that the clause is not enforceable. There is no merit in the submission. In his E-mail dated 31st October 2007, the Defendant referred to the discussions which had been held with the Plaintiff and stated that he shall honour the provisions of the Garden Leave Clause “after contesting its propriety”. When the application for ad-interim relief came up on 1st November 2007 (and was adjourned with a view

to enable parties to exchange their pleadings), the Court recorded the statement of the Defendant that he would be willing to observe the negative covenant till the next date of hearing. Consequently, in the statement made in the Defendant's E-mail dated 15th November 2007, a reference was made to the statement made before this Court which clearly was until the next date of hearing. Similarly, there is no merit in the submission that the Defendant has breached his statement because during the course of the hearing, the Defendant has stated through his Counsel that even as of date, no final agreement has been entered into by the Defendant with the third party employer. The Defendant has stated that one of the career opportunities that has come to him is from a Company by the name of Computer Science Corporation (CSC) which is a leading Global Information Technology Services Company. The Defendant has stated that though he has taken a decision to accept the offer of CSC, he has neither entered into any contract with the employer as of date nor has he joined the services of that employer.

13. The next aspect of the claim for relief that has been urged

on behalf of the Plaintiff is in regard to the agreement for confidentiality. The [M.O.U.](#) dated 10th December 2003 recognizes that the Defendant shall not make use of disseminate or disclose confidential information of the Plaintiff during the period of employment to any person, firm or business except for negotiation or consultation with personnel or representatives of the Company. A clause prohibiting an employee from disclosing commercial or trade secrets is not in restraint of trade. The effect of such a clause is not to restrain the employee from exercising a lawful profession, trade or business within the meaning of Section 27 of the Contract Act. The submission of Counsel for the Defendant however, is that the relief which has been sought in prayer clause (b) of the Notice of Motion is extremely vague and cannot be regarded as something which would confine itself to the non disclosure of confidential information alone. The plaint does not contain any specific description of the nature of the confidential information in respect of which an injunction against disclosure is sought. In paragraph 20 of the affidavit in rejoinder the Plaintiff has itemised the trade secrets or confidential information that are available with the Defendant consequent upon his

engagement by the Plaintiff. The case of the Plaintiff is that the work of outsourcing Visa applications was obtained inter alia from the U.K. In connection with this work, the Defendant was engaged in the VFS Division. The contention of the Defendant on the other hand is that the trade secrets that are sought to be itemised in paragraph 20 to the reply are no secrets at all and that the entire information falls in the public domain or, as the case may be, of industry practice. Be that as it may, it has been stated on behalf of the Defendant that the Defendant shall not part with any confidential information received in respect of the items listed out in paragraph 20 of the affidavit in rejoinder of the Plaintiff subject to such information not being in the public domain. This is accepted on behalf of the Plaintiff by learned Counsel. The assurance given on the part of the Defendant is duly accepted in the aforesaid terms.

14. In the circumstances, the relief as sought in terms of prayer clause (a) of the Notice of Motion cannot be for the reasons already recorded be granted. The relief in terms of prayer clause (b) has already been dealt with in terms of the statement of the Defendant as

recorded herein above which has been accepted. In so far as prayer clauses (c), (d) and (e) are concerned, the prayer therein which seeks an injunction from soliciting customers and employees and from interacting with UK Visas or from using any contact made by the Defendant with embassies and consulates cannot be granted. The relief as claimed is vague and shall accordingly stand refused. The Defendant has agreed to complete all formalities for handover of duties.

15. The Notice of Motion shall accordingly stand disposed of.
